STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Cooper, P.J., and Jansen & Hoekstra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v Docket No. 129269

DELORES MARIE DERROR,

Defendant-Appellee.
_____/

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

On September 30, 2004, plaintiff filed an interlocutory application for leave to appeal two orders of the Grand Traverse County Circuit Court, dated September 27, 2004 and September 30, 2004, with the Court of Appeals. The Court of Appeals granted plaintiff's application, with jurisdiction based upon MCR 7.302(B)(1) and MCL 770.12(2)(a). The Court of Appeals issued a published opinion on July 12, 2005. After reconsideration, the Court issued an order vacating its original decision and issuing a new opinion on September 6, 2005. *People v Derror*, ___ MA ___ (No. 258346, filed September 6, 2005). (Appendix, p 258a-277a). Plaintiff filed an application for leave to appeal with this Court on August 6, 2005, and a motion to add issue on September 30, 2005. This Court granted plaintiff's application and motion by order dated October 19, 2005 (Appendix, p 278a). This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MICH. CONST. 1963, Article VI, § 4.

QUESTIONS PRESENTED

QUESTION I: Is carboxy THC a schedule 1 controlled substance for purposes of Michigan's per se drug law, MCL 257.625(8)?

Plaintiff answers: "Yes."

Defendant answers: "No."

Trial court answers: "No."

Court of Appeals answers: "No."

QUESTION II: In proving violation of Michigan's per se drug law causing death or serious injury, must the prosecution prove beyond a reasonable doubt that defendant knew that she had consumed an intoxicating agent and might be intoxicated?

Plaintiff answers: "No."

Defendant answers: "Yes."

Trial court answers: The trial court did not answer this question

Court of Appeals: The Court of Appeals did not answer this question

FACTS

Plaintiff appeals the September 15, 2005 decision of the Michigan Court of Appeals[1] holding that carboxy THC is not a schedule 1 controlled substance for purposes of Michigan's per se drug law.[2] In addition, this Court granted plaintiff's motion to add a second issue: whether the prosecution is required to prove beyond a reasonable doubt that a defendant charged with violating the per se drug law voluntarily decided to drive knowing that he or she had consumed an intoxicating agent *and might be intoxicated.* This second issue arose in response to this Court's recent decision in *People v Schaefer*,[3] released after the Court of Appeals issued its original opinion on July 12, 2005, but before the Court issued its new opinion after reconsideration. This Court also denied defendant's cross-application for leave to appeal the Court of Appeals ruling, made upon reconsideration and in light of *Schaefer*, that the prosecution is not required to prove defendant's *intoxicated* driving was a proximate cause of the death or serious injury. The relevant facts are as follows.

Charges against defendant arise out of an incident which occurred on January 11, 2004 at approximately 6:00 pm, in which defendant lost control of her vehicle on M-72 near the Kalkaska County line in Grand Traverse County. Defendant's vehicle crossed the center line and struck an oncoming vehicle. As a result of the crash the oncoming vehicle, driven by Randy Elkins, was badly damaged killing the front seat passenger,

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[1] *People v Derror*, ___ Mich App ___ (No. 258346, September 6, 2005) (Appendix, pp 258a-277a).

[2] MCL 257.625(8)

[3] 473 Mich 418 (2005)

Angela Jo Grierson, and seriously injuring three children.[4] On April 6, 2004 defendant was charged with operating a motor vehicle with any amount of a schedule 1 controlled substance in her body causing death, contrary to MCL 257.625(4) and MCL 257.625(8); three counts of operating a motor vehicle with any amount of a schedule 1 controlled substance in her body causing serious injury, contrary to MCL 257.625(5) and MCL 257.625(8); and possession of marijuana, contrary to MCL 333.7403(2)(d).

At the preliminary examination, Randy Elkins testified that he was traveling westbound on M-72 when he observed an eastbound vehicle enter his lane of travel, striking his vehicle head-on, and causing the death and injuries to his passengers as described above. (Transcript of PE, pp 6-9; Appendix, pp 8a-11a). On cross examination, Elkins testified that the roads were "snowy and slushy" at the time of the crash. (Transcript of PE, pp 10-11; Appendix, pp 12a-13a). Elkins stated that he observed defendant's vehicle prior to the crash and observed no erratic driving prior to seeing the vehicle crossing the center line. Elkins testified that he observed a trailer attached to defendant's vehicle "swerving a little bit, and it pushed the whole truck and the vehicle over into my lane." (Transcript of PE, p 11; Appendix, p 13a). On re-direct examination, Elkins testified that he was able to maintain complete control of his vehicle despite the road conditions. (Transcript of PE, p 14; Appendix, p 16a).

Sergeant Randy Fewless testified that he was dispatched to the scene of the crash shortly after it occurred. Fewless and another officer searched defendant's purse for identification and found five marijuana roaches inside what was later determined to be a

[4] Brittany Elkins, age 10, was permanently paralyzed from the waist down, Eden Elkins, age 11, was permanently paralyzed from the chest down, and Natasha Elkins, age 4, suffered a serious neck fracture.

makeup container. (Transcript of PE, pp 29-30; Appendix, pp 31a-32a). Fewless also interviewed defendant at the hospital where she was being treated for injuries sustained in the crash. Defendant admitted that she had lost control of her vehicle on slippery roads and crossed the center line, striking the Elkin's vehicle. Defendant also admitted to having consumed one marijuana cigarette at about 2:00 pm, approximately four hours prior to the crash. (Transcript of PE, p 32; Appendix, p 34a). Based upon this information, Fewless obtained a search warrant to take a blood specimen from defendant. The blood was drawn at about 11:00 pm, approximately five hours after the crash. (Transcript of PE, p 33; Appendix, p 35a). In addition, a blood specimen was withdrawn from defendant at approximately 8:00 pm for medical purposes. Fewless later obtained this specimen by way of a search warrant and both specimens were sent to the State Forensics Laboratory for analysis for possible controlled substances. (Transcript of PE, p 34; Appendix, p 36a).

Dr. Michelle Glinn, a toxicologist and Supervisor of the Toxicology Unit of the State Forensics Laboratory (Transcript of PE, p 50; Appendix, p 52a), testified that both blood specimens taken from defendant tested positive for carboxy THC[5] a metabolite of THC,[6] the psychoactive ingredient found in marijuana. The specimen drawn at approximately 8:00 pm showed the presence of 38 nanograms per milliliter (ng/ml) of carboxy THC. (Transcript of PE, pp 57-58; Appendix, pp 59a-60a). The specimen drawn at approximately 11:00 pm showed the presence of 31 ng/ml of carboxy THC.

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[5] Also referred to as "11-COOH-THC." (See Transcript of PE, p 66; Appendix, p 68a). The two terms are used interchangeably throughout the transcripts.

[6] Delta-9-tetrahydrocannabinol. (See Transcript of PE, p 60; Appendix, p 62a and Transcript of Evidentiary Hearing, pp 27-28; Appendix, pp 123a-124a).

The parent drug, THC, was not detected in either sample. (Transcript of PE, pp 53-54; Appendix, pp 55a-56a).

Glinn testified that carboxy THC is itself a schedule one controlled substance because it is both a derivative and a compound of THC. (Transcript of PE, pp 58-61; Appendix, pp 60a-63a). Glinn testified that in order for a blood specimen to test positive for carboxy THC, the donor must have at some point in time ingested marijuana prior to the specimen collection. (Transcript of PE, pp 61, 72; Appendix, pp 63a, 74a).

No evidence was offered at the preliminary examination to prove that defendant was impaired by her use of marijuana, that her impairment was a proximate cause of the crash, or that defendant knew she might be impaired by marijuana. Defendant attempted to question Glinn regarding whether the level of carboxy THC detected in defendant's blood would have had an impairing effect on defendant at the time of driving. Plaintiff objected to the question, and, after reviewing the relevant statute, the magistrate sustained plaintiff's objection holding that the statute does not require plaintiff to prove impairment. (Transcript of PE, pp 68-71; Appendix, pp 70a-73a).

In response to a question posed by the magistrate, Glinn testified that the level of carboxy THC detected in defendant's blood was consistent with defendant having consumed marijuana within the past four to eight hours prior to her blood being drawn. However, the level was not consistent with defendant having consumed marijuana the previous day or week. (Transcript of PE, p 76; Appendix, p 78a). On redirect examination, Dr. Glinn was asked whether the fact that THC is no longer present in blood indicates that the defendant is no longer experiencing any pharmacological effects from THC. Dr. Glinn, in answering "[n]o," explains as follows:

> THC is taken up into the brain and other tissues and into fat cells and into other tissues, and it leaves its effects on the brain and central nervous system for quite a while after it's not detectible in the blood any further. The effects of – it causes chemical changes in the brain, basically, that persist for quite a while. And you can document defects in lab studies of THC beyond the time when it's no longer detectable in the blood. (Transcript of PE, pp 72-73; Appendix, pp 74a-75a).

Further, Glinn states:

> You can't correlate the levels with the effects very well. You could still be under – having some of the effects of the parent drug persisting and you still have a little metabolite persisting . . . . (Transcript of PE, p 73; Appendix, p 75a).

Defendant objected to the bind over arguing that carboxy THC is not a schedule 1 controlled substance and because there was no evidence to indicate that defendant was impaired by marijuana at the time of the crash. (Transcript of PE, p 78; Appendix, p 80a). Notwithstanding defendant's objection, the magistrate bound the case over for trial, finding that carboxy THC is a schedule 1 controlled substance. (Transcript of PE, p 79; Appendix, p 81a). The magistrate also held that proof of the presence of a schedule 1 controlled substance is all that is required without any showing of impairment where defendant is charged with violating Michigan's per se drug law causing death or serious injury. (Transcript of PE, p 78; Appendix, p 80a).

On June 19, 2004, plaintiff filed a request for jury instructions with the trial court consistent with plaintiff's argument and the magistrate's ruling at the preliminary examination. On September 17, 2004, an evidentiary hearing was held on the issue whether carboxy THC is itself a schedule 1 controlled substance. Both Glinn and defense expert, Dr. Daniel McCoy, testified, but gave differing opinions as to whether carboxy THC is itself included in schedule 1. Both experts' opinions are summarized in their

written reports which were admitted into evidence at the hearing (Appendix, pp 193a-196a (Glinn) and pp 197a-198a (McCoy)).

Glinn testified that carboxy THC is included in schedule 1 because it is both a derivative of THC as set forth in the Public Health Code, § 7212(1)(d),[7] as well as a compound of THC as set forth in § 7212(1)(e).[8] (Transcript of Evidentiary Hearing, pp 8-9, 35; Appendix, pp 104a-105a, 131a). Glinn also states that carboxy THC and THC share a similar chemical structure. (Transcript of Evidentiary Hearing, p 10; Appendix, p 106a). Glinn observed that the only difference between the two molecules is at the eleventh position where the carboxy THC molecule contains two additional oxygen atoms and two less hydrogen atoms. (Transcript of Evidentiary Hearing, pp 10-11; Appendix, pp 106a-107a; see also the molecular diagram, written opinion of Dr. Glinn, p 4; Appendix, p 196a). Glinn explained that a derivative is a chemical modification of a parent compound. "The derivative reacts, where you take a parent compound, parent drug, react it with something else, produce something else for whatever reason." (Transcript of Evidentiary Hearing, p 11; Appendix, p 107a). Glinn goes on to explain that a compound is something composed of more than one kind of atom. Basically, most substances are compounds, however, the term "compound" is further qualified by the phrase "having a similar chemical structure" to the parent molecule. Carboxy THC is a compound with a similar chemical structure. Therefore, Glinn concludes, carboxy THC is included in schedule 1. (Transcript of Evidentiary Hearing, p 12, Appendix, p 108a).

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[7] MCL 333.7212(1)(d).

[8] MCL 333.7212(1)(e).

Glinn also testified that until just two years ago,[9] the State Forensics Laboratory did not test for the parent drug, THC, at all, and that testing to determine whether an individual had used marijuana was limited to determining the amount of metabolites present in the individual's urine. (Transcript of Evidentiary Hearing, pp 13-14, 18; Appendix, pp 109a-110a, 114a). Therefore, up until three years ago, in driving under the influence of marijuana cases, the fact that a person had consumed marijuana was based entirely upon the presence of metabolites in the person's urine, not the presence of THC. Based upon her own experience and epidemiological studies, Glinn testified that she has offered opinions about whether someone was under the influence of or impaired by marijuana based upon the results of an analysis showing the presence of carboxy THC, together with testimony about the defendant's driving behavior, demeanor, witness statements, and the defendant's own statements about when and how much marijuana he or she had consumed. (Transcript of Evidentiary Hearing, pp 18-19; Appendix, pp 114a-115a).

Glinn agrees that carboxy THC has no known pharmacological effect. (Transcript of Evidentiary Hearing, p 15, Appendix, p 111a). However, she notes that a person cannot have carboxy THC in their system unless at some point they have in some way ingested marijuana. (Transcript of Evidentiary Hearing, pp 19, 44; Appendix, pp 115a, 140a). Glinn explains that when someone smokes marijuana THC is absorbed into the blood stream and then rapidly converted into metabolites, such as carboxy THC. The level of the parent chemical, THC, drops rapidly. Within an hour or two, THC is no longer detectable in the blood, however, the effects of marijuana may last up to 24 hours.

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[9] Since the hearing was held in April, 2004, two years from that date would be approaching nearly four years ago as of today's date, or April 2002.

(Transcript of Evidentiary Hearing, p 15; Appendix, p 111a). This is because the THC is absorbed into the fatty tissues of the body, including the brain, where it affects psychomotor skills. Therefore, the lack of THC bears no relationship to the level of impairment of a particular individual. A high blood THC level may indicate that the THC has not yet been absorbed into the brain tissue where it acts. Just because THC is absent in blood does not mean a person is sober and not experiencing the effects of the marijuana. (Transcript of Evidentiary Hearing, pp 15-16; Appendix, pp 111a-112a).

In response to the court's questioning, Glinn testified that the effects of marijuana on driving cannot be easily correlated to a specific level of THC or carboxy THC in the blood, as with alcohol. (Transcript of Evidentiary Hearing, p 16; Appendix, p 112a). Glinn further testified that several epidemiological studies have tried to correlate driving behavior with levels of marijuana use. (Transcript of Evidentiary Hearing, p 17; Appendix, p 113a). Glinn states that the amount of carboxy THC found in the present case (38 ng per ml) is higher than the average level which she typically associates with driving under the influence of marijuana. The average for driving under the influence cases which Glinn sees in the laboratory is 30 ng/ml, which is consistent with some studies. (Transcript of Evidentiary Hearing, pp 18, 20; Appendix, pp 113a-114a, 116a). It was "not a small amount of marijuana," Glinn states. (Transcript of Evidentiary Hearing, pp 21-22, 40; Appendix, pp 117a-118a, 136a). Glinn testified that she was at least "reasonably certain" that defendant was impaired by marijuana at the time of the crash in this case. (Transcript of Evidentiary Hearing, p 22; Appendix, p 118a).

The court, noting that as THC metabolizes the number of THC metabolites increase and then fall, asked Glinn if she could draw any conclusion "in reverse, as you do with alcohol," about the level of "potency four hours earlier." Glinn replied "[n]o."

On cross-examination, Glinn was asked, "if they [the Legislature] had intended to include metabolites under Schedule One they could have used the word metabolites [in the statute]?" Glinn responds: "They may have been under the impression they were covering that, because my reading of that statute, it's meant to be fairly broad and meant to cover all the entities." (Transcript of Evidentiary Hearing, pp 29-30; Appendix, pp 125a-126a). Glinn agreed that carboxy THC is not a "synthetic substance," an "isomer of THC," or a "resinous extractive" of THC. (Transcript of Evidentiary Hearing, p 33; Appendix, p 129a). Glinn testified that how long carboxy THC may stay in a person's blood stream depends upon the sensitivity of the testing. In urine, this may be several weeks. However, in blood it may last a couple days at levels "much lower" than the cut off levels those used by the State Forensics Laboratory. Although Glinn agreed that tests which measure units lower than one nanogram may show the presence of carboxy THC in blood for up to six days, the testing done by Glinn's laboratory does not report units less than one nanogram and would not report a positive result for any amount less than one nanogram. (Transcript of Evidentiary Hearing, pp 39-40; Appendix, pp 135a-136a).

When asked whether there was a difference between a derivative and a metabolite, Glinn testified that a metabolite is a type of derivative. (Transcript of Evidentiary Hearing, p 46; Appendix, p 142a). A metabolite is a derivative that is created inside the body. (Transcript of Evidentiary Hearing, p 46; Appendix, p 142a).

Dr. Daniel McCoy, a toxicologist employed at AIT Laboratories in Indianapolis, Indiana, testified for the defense. (Transcript of Evidentiary Hearing, p 56; Appendix, p 152a). McCoy testified that carboxy THC does not fit within the definition of schedule 1. (Transcript of Evidentiary Hearing, p 61; Appendix, p 157a). McCoy testified that the term derivative is typically applied to a chemical reaction that happens outside the body, while metabolism refers to a reaction that occurs inside the body. (Transcript of Evidentiary Hearing, pp 62, 65; Appendix, pp 158a, 161a). McCoy also testified that it was his opinion that the legislative intent was not to include carboxy THC in schedule 1 because schedule 1 was written to include substances having no reasonable medical use and having a high risk of abuse. Therefore, it would not make sense for the legislature to include a substance such as carboxy THC in schedule 1 because it has no pharmacological effect. (Transcript of Evidentiary Hearing, p 63; Appendix, p 159a).

Further, McCoy testified that based upon the amounts of carboxy THC found in the present case, he would be unable to conclude anything about whether defendant was impaired by THC at the time of the offense. (Transcript of Evidentiary Hearing, p 66; Appendix, p 162a). McCoy states that the only reliable way to perform a retrograde extrapolation to determine the level of THC in someone's body is to have THC concentrations determined. (Transcript of Evidentiary Hearing, pp 67, 71; Appendix, pp 163a, 167a). McCoy agreed with Glinn that unlike alcohol marijuana does not lend itself to associating any particular number of THC or carboxy THC to a particular level of impairment. (Transcript of Evidentiary Hearing, p 71; Appendix, p 71). This is due in part to the insufficient number of studies in this area. (Transcript of Evidentiary Hearing, pp 71-73; Appendix, pp 167a-169a). The trial court asked McCoy: "Is it true you still

expect to see the impairment from THC even after the THC has been metabolized and, if so, why is that?" McCoy responded as follows:

> . . . . If you look at THC as it clears the blood it doesn't mean it's cleared the brain yet, it's still there and it may be there and may be, if you will, seeping back into the blood on a very gradual basis, but on such a small quantity we won't be able to measure in, but it still has some activity in the brain. (Transcript of Evidentiary Hearing, p 76; Appendix, p 172a).

McCoy further states: "It's possible that [defendant] was impaired, but it's possible that [defendant] wasn't impaired. But we don't know which is more likely because we don't know how much, if there was any, THC present." (Transcript of Evidentiary Hearing, p 77; Appendix, p 173a).

On cross-examination, McCoy agreed that THC rapidly leaves the bloodstream after it is ingested. (Transcript of Evidentiary Hearing, p 81; Appendix, p 177a). McCoy testified that after two hours blood levels for THC are always below five nanograms. "That's fairly well accepted in the scientific community," he states. (Transcript of Evidentiary Hearing, p 81; Appendix, p 177a). McCoy also agreed that federal regulations for workplace safety look to carboxy THC levels rather than the parent drug. Under federal guidelines, a measurement of 20 ng/ml of carboxy THC indicates that a person is actively using marijuana. (Transcript of Evidentiary Hearing, p 82; Appendix, p 178a). However, using the testing procedure the Michigan State Crime Laboratory employs, Gas Chromatography/Mass Spectrometry (GC/MS), the confirmation level is lower, at 5ng/ml (Transcript of Evidentiary Hearing, p 82; Appendix, p 178a; see also **Cannabis (Marijuana) – Effects on Human Behavior and Performance** by Dr. Marilyn A. Huestis, p 23; Appendix, p 206a).

The court asked McCoy whether the fact that defendant had 31 or 38 nanograms of carboxy THC in her blood at the time it was measured following the accident whether that is "evidence of any amount of THC in your bloodstream at the time of the accident?" McCoy responds as follows:

> No, not a measurible (sic) concentration of THC, not in the terms we use in science. We could go off in a theoretical discussion that I would be happy to participate in and say, well, yeah, there is one molecule floating around or there is five or some small number and that's likely to be the case if someone ever had used marijuana in their lifetime. But, in terms of how we are measuring and talking today, no, sir, I don't think there is an indication what the THC level would have been or if it was present at the time of the accident based on those two numbers. (Transcript of Evidentiary Hearing, p 70; Appendix, p 166a).

On cross-examination, McCoy was questioned further about his answer. McCoy was asked why he did not say "no" to the court's question, and was asked whether he would be surprised to find no THC where carboxy THC is present. The following colloquy occurred:

> Dr. McCoy: "Any amount there could be some I don't know whether it's a measurable quantity because again, not knowing what this person"
>
> Prosecutor: Let's not talk about measurable quantities though, is there THC at the time of the accident you would be surprised if there isn't some quantity in there that is testable by normal testing procedures?
>
> Dr. McCoy: No, if you mean by performance tests.
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> Prosecutor: By well accepted Dr. Huestis talks about tests that measure in manaograms?
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> Dr. McCoy: Pico grams, smaller.
>
> Prosecutor: Okay.
>
> . . . .
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> Prosecutor: Am I correct, sir, that you would be surprised using testing methods Dr. Heustis uses you would be surprised

if you didn't find THC in Delores Derror's blood or body?

Dr. McCoy: I wouldn't be surprised.

(Transcript of Evidentiary Hearing, pp 83-84; Appendix, pp 179a-180a).

The court further asks McCoy: "Is it true you still expect to see the impairment from THC even after the THC has been metaboliezed and, if so, why is that?" McCoy responds:

> . . . when we measure a compound like alcohol we can measure it in the blood or the breath, and blood happens to have a lot more than the rest of the body, it has more water, it's accessible and measurable, it clears the blood it's virtually no longer there, that's going to have the highest concentration if you will or equal to most of the things. If you look at THC as it clears the blood it doesn't mean it's cleared the brain yet, it's still there and it may be there and may be, if you will, seeping back into the blood on a very gradual basis, but on such a small quantity we won't be able to measure in, but it still has some activity in the brain. (Transcript of Evidentiary Hearing, pp 75-76; Appendix, pp 171a-172a).

In attempting to explain how THC is metabolized in the body, and why it is not readily subject to retrograde extrapolation, McCoy states:

> Alcohol when we compare it chemically, it's a simple compound compared to THC . . . it's processed in a fairly simple way . . . which is quite different than how THC goes. THC it falls in the blood very rapidly, but it's not because it's metabolized rapidly, it's because it's deposited in fat, in tissue, it clears in that first phase, it falls exponentially very rapidly . . . . The reason it drops it's distributed to the tissues, the fat, including the brain, lipids in the brain, where it's having the effect. That's why if we look at the blood concentration in some ways is not at all the concentration that's causing the effect of marijuana because it's distributing to the brain and staying there and having it's (sic) effect while disappearing in the blood . . . . Once it gets down to lower levels it is building up all the time, . . . (Transcript of Evidentiary Hearing, p 72; Appendix, p 168a)

Further, McCoy states:

> It's a much more difficult process. It's a different type of drug totally, has multiple effects. Alcohol tends to have, in pharmacological terms, a fairly simple effect . . . it has a complex mixture of effects. (Transcript of Evidentiary Hearing, pp 73-74; Appendix, pp 169a-170a).

Finally, McCoy agreed with the conclusion of Huestis, the author of a scientific journal article upon which both experts based their opinions, that: "the fact that any situation in which both safety for self and others depends on alertness and capability of control of man machine interaction precludes the use of marijuana." (Transcript of Evidentiary Hearing, p 84; Appendix, p 180a) (see also **Cannabis**, supra at 45; Appendix, p 228a). The Huestis journal article was heavily relied upon by both experts and was admitted as an exhibit at the hearing to further explain the metabolism and impairing effects of marijuana. (**Cannabis**, supra; Appendix, pp 199a-243a).

Further, McCoy admits that the effects of marijuana can last up to 24 hours, even though the parent drug THC is no longer in the blood stream where it is typically measured, it is in the body tissue, including brain tissue. (Transcript of Evidentiary Hearing, p 86; Appendix, p 182a). McCoy agreed that THC and carboxy THC are in the same family, carboxy THC often being referred to as the "daughter" of THC. (Transcript of Evidentiary Hearing, p 87; Appendix, p 183a). McCoy testified that both substances are referred to as "cannabinoids," and that carboxy THC has a similar chemical structure to THC. (Transcript of Evidentiary Hearing, pp 88, 90; Appendix, pp 184a, 186a). McCoy also agrees that carboxy THC is a compound of THC. (Transcript of Evidentiary Hearing, p 91; Appendix, p 187a). Although McCoy denied that carboxy THC was a "derivative" of THC as that term is commonly used, he nonetheless agreed that the term "derivative" as used in the statute could be "misinterpreted" as including metabolites,

noting that it would be more clear had the Legislature added the term "metabolites" in addition to derivatives. (Transcript of Evidentiary Hearing, p 92; Appendix, p 188a). Finally, McCoy testified that unlike derivatives, compounds are not limited to "in vitro" creation. (Transcript of Evidentiary Hearing, p 93; Appendix, p 189a).

At this point in the hearing the trial court interrupted stating:

> [T]he issue we're down to is legislative intent to put this in my simple terms we're talking about two dogs ones (sic) got teeth and one doesn't. Dr. McCoy's position is in order for that dog to be band (sic) it has to have teeth both dogs both Schedule 1 is harmful psychotropic effect addictive thing . . . Dr. Glinn's position is different she would include definition of Schedule 1 dogs whether or not they have teeth . . . (Transcript of Evidentiary Hearing, p 93; Appendix, p 189a).

On September 20, 2004, the trial court issued an opinion finding that carboxy THC is not itself a schedule 1 controlled substance.[10] The Court did, however, find that evidence of carboxy THC in blood may be used to establish that THC was present in the defendant's blood at the time of driving. The court further held that the jury could make its own assessment of the credibility of the experts and the weight to be given their testimony regarding their opinions about the presence or lack thereof of THC in the defendant's body at the time of the accident and whether any impairment was manifested at the time of the accident.

The court issued a second order on September 30, 2004 denying plaintiff's requested jury instruction and requiring the prosecution to prove that defendant's impaired driving was the proximate cause of the crash.[11] The trial court also refused to stay the case pending interlocutory appeal of its orders.

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[10] See trial court opinion dated September 20, 2004, Appendix, pp 244a-247a.

[11] See trial court opinion dated September 30, 2004, Appendix, pp 248a-251a.

On September 30, 2004, plaintiff filed an application for leave to appeal both orders, a motion for immediate consideration based upon a pending trial date of October 26, 2004, and a motion to stay proceedings in the trial court until the outcome of plaintiff's appeal. Defendant filed a response to the application and motions on October 15, 2004. On October 21, 2004, the Court of Appeals granted plaintiff's motion for immediate consideration and plaintiff's application for leave to appeal, limited to the issues raised in the application, and stayed proceedings in the trial court. (Order, Appendix, p 278a). Subsequently, the Court of Appeals granted leave in a separate case, *People v Kurts*[12] also raising the issue whether carboxy THC is a schedule 1 controlled substance, and combined it with this case for appeal.

On June 12, 2005, the Court of Appeals issued a *per curiam* opinion denying plaintiff's appeal as to both issues. Plaintiff filed an application for leave to appeal with this Court on August 6, 2005. On July 27, 2005, this Court issued its opinion in *People v Schaefer* and *People v Large*.[13] In that case, the Court held that the prosecution, in an OUIL causing death case, is not required to prove that the defendant's intoxicated driving was a substantial cause of the victim's death.[14] Based upon the holding in *Schaefer*, plaintiff filed a motion for reconsideration with the Court of Appeals as to the causation issue, and, on September 6, 2005, the Court issued an order vacating its original decision and issuing a new opinion granting plaintiff's appeal as to the causation issue only. (Appendix, pp 258a-277a).

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[12] (Michigan Court of Appeals, docket no. 259315).

[13] 473 Mich 418 (2005).

[14] *Id.* at 422.

On September 30, 2005, plaintiff filed a motion with this Court to add an issue regarding the proper elements of violation of Michigan's per se drug law causing death and serious injury. Plaintiff's motion was based upon this Court's holding in *Schaefer* which for the first time addressed the elements of this new crime. This Court granted plaintiff's application for leave to appeal limited to the issues: (1) whether carboxy THC is a schedule 1 controlled substance within the meaning of § 625(8);[15] and (2) whether in a prosecution brought under Michigan's per se drug law causing death and serious injury the prosecutor must prove beyond a reasonable doubt that defendant knew the ingestion of the controlled substance may cause intoxication. At the same time, this Court denied defendant's cross-application for leave to appeal the causation issue.

[15] MCL 257.625(8);

ARGUMENT

I. CARBOXY THC IS A SCHEDULE 1 CONTROLLED SUBSTANCE FOR PURPOSES OF MICHIGAN'S PER SE DRUG LAW

STANDARD OF REVIEW: Whether carboxy THC is a schedule 1 controlled substance is a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error while the questions of law are reviewed *de novo*.[16] Statutory interpretation is a question of law that is subject to review de novo by this Court.[17]

PRESERVATION OF ISSUE: Plaintiff raised this issue in a pre-trial request for jury instructions filed June 9, 2004. The trial court considered and denied plaintiff's requested jury instructions in an order dated September 27, 2004. (Appendix, pp 244a-247a). Therefore, the issue is properly preserved for appeal.

Carboxy THC is both a "derivative" and a "compound" of THC with a similar chemical structure, and, therefore, is a substance included in schedule 1 of the Public Health Code.[18] The Court of Appeals erred in its interpretation of schedule 1 having applied an incorrect rule of grammar to the statute, and then compounded that error by attempting to discern the Legislature's intent in enacting the law without regard to the plain language of the statute. Even if this Court were to find that the statutory language is

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[16] *People v LeBlanc*, 465 Mich 575, 579 (2002)

[17] *People v Van Tubbergen*, 249 Mich 354, 360 (2002)

[18] MCL 333.7212.

ambiguous and that judicial construction is necessary, it is unlikely that the Legislature intended to limit the application of the statute by excluding metabolites of THC. To do so would substantially defeat the Legislature's purpose which was to create stiff penalties for operating a motor vehicle after having consumed marijuana. Excluding metabolites from the purview of the per se drug law would also produce disparate results where the ability to prosecute would have more to do with the timing of a blood test than the amount of marijuana used or the degree of a particular defendant's impairment. This Court should find that carboxy THC is a schedule 1 controlled substance for purposes of Michigan's per se drug law.[19]

A. A FAIR READING OF SCHEDULE 1 INDICATES THAT CARBOXY THC IS INCLUDED AMONG THE LISTED SUBSTANCES.

A fair reading of the plain language of schedule 1 leads to the conclusion that carboxy THC is among the substances included in the list of proscribed substances. The testimony below indicates that carboxy THC is both a derivative and a compound of THC with a similar chemical structure. The Court of Appeals erred when it held that the terms "derivatives" and "compounds" are limited to synthetic substances only.

Michigan's drunk driving laws were amended in September 2003 to reflect the changes found in Public Act 61 of 2003, effective September 30, 2003. Act 61 created a new crime for operating a motor vehicle while having any amount of a "controlled

[19] MCL 257.625(8)

substance listed in schedule 1 under section 7212 . . . or section 7214(a)(iv)[20] of the public health code" (also referred to as Michigan's "per se drug law"). In addition, the amendment created enhanced penalties for violations of the per se drug law resulting in death[21] or serious injury[22] consistent with those for operating while intoxicated.

Schedule 1 controlled substances are defined in § 7212 of the Public Health Code,[23] which provides in pertinent part as follows:

> . . . .
>
> (c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, when the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:
>
> . . . .
>
> (d) Except as provided in subsection (2), synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, *derivatives*, and their isomers *with similar chemical structure or pharmacological activity, or both*, such as the following, are included in schedule 1:
>
> (i) delta#super1 cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (ii) delta#super6 cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (iii) delta#super3,4 cis or trans tetrahydrocannabinol, and their optical isomers.

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[20] Cocaine, a schedule 2 controlled substance, is also included among the drugs proscribed by MCL 257.625(8).

[21] MCL 257.625(4).

[22] MCL 257.625(5).

[23] MCL 333.7212

> (e) *Compounds* of structures of substances referred to in subdivision (d), regardless of numerical designation of atomic positions, are included [emphasis added].

Examination of the above language leads to the conclusion that carboxy THC is included in schedule 1. Dr. Michelle Glinn, Supervisor of the Toxicology Unit of the State Forensics Laboratory, testified that the above section dealing with marijuana necessarily includes carboxy THC because carboxy THC is both a "derivative" and a "compound" of THC "with [a] similar chemical structure." (Transcript of PE, pp 58-60; Appendix, pp 60a-62a; Transcript of Evidentiary Hearing, pp 8-9; Appendix, pp 104a-105a).

Defendant argues that carboxy THC is not a "derivative" of THC because carboxy THC is a metabolite of THC, and metabolites are derivatives produced inside the body, not outside the body in a test tube. While Glinn did not dispute that derivatives are commonly produced outside the body, she nevertheless maintains that there is no real difference between metabolites and derivatives, except that metabolites are derivatives created inside the body. If one considers the testimony of both experts, it seems apparent that metabolites are a subset of the broader group of substances referred to as derivatives. McCoy at one point acknowledged that the use of the term "derivative" in the statute is confusing because metabolites are essentially derivatives produced "in vitro," or "in the body." McCoy ultimately states that it would have been clearer for the Legislature to have included the term metabolite in addition to the word derivative if it was in fact the Legislature's intent to include metabolites of marijuana in schedule 1. (Transcript of Evidentiary Hearing, p 92; Appendix, p 188a). However, plaintiff submits that this

redundancy was unnecessary where metabolites are truly a subset of the broader group of substances we call derivatives.

Even if one accepts McCoy's interpretation of the word "derivative," McCoy was not able to explain why carboxy THC is not a "compound" of THC with a "similar chemical structure" as described in § 7212(1)(e).[24] In fact, McCoy admitted that: (1) carboxy THC is a compound of THC (Transcript of evidentiary hearing, p 91; Appendix, p 187a); and (2) carboxy THC has a similar chemical structure to the parent drug THC (Transcript of evidentiary hearing, pp 88, 90; Appendix, pp 184a, 186a). Further, McCoy did not dispute that the only way for carboxy THC to enter an individual's blood stream is for that person to have first ingested THC.

McCoy's testimony urging that carboxy THC is not included in schedule 1 is primarily based not upon the language of the statute at all, but, rather, McCoy's own attempts to discern the Legislative intent. (See generally Transcript of Evidentiary Hearing, pp 62-63, Appendix, pp 158a-159a). McCoy argues at one point that since everything is a compound of something else, the Legislature could not have intended to include metabolites of THC having because the statute would be too broad. However, the statute specifically limits schedule 1 to compounds "with similar chemical structure, pharmacological activity, or both."[25] McCoy's concern is misplaced because it ignores this qualifying language of the statute which requires that the substances have a similar chemical structure.

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[24] MCL 333.7212(1)(e).

[25] MCL 333.7212(1)(d) and (e).

It is important to note that in this case the substances involved are not some distant relatives. McCoy testified that carboxy THC is commonly referred to as the "daughter" of THC, produced only through the metabolization of THC. (Transcript of Evidentiary Hearing, pp 87-88, 90; Appendix, pp 183a-184a, 186a). And, carboxy THC has long been the substance most commonly used to determine whether a person has been using marijuana. For example, up until approximately four years ago, the State Forensics Laboratory tested for THC in urine only – not blood. (Transcript of Evidentiary Hearing, pp 13-14, 18; Appendix, pp 109a-110a, 114a). Because urine is a product of metabolism, the parent compound THC will never be found in urine since only metabolites occur in urine. Similarly, testing of employees for work place safety is generally performed by collecting urine samples, not blood. (Transcript of Evidentiary Hearing, p 82; Appendix, p 178a). Also, both experts agree that the level of THC in blood does not reflect whether a person is impaired by THC. Because THC is rapidly absorbed into the brain and other fatty tissues of the body where it has its effect on psychomotor skills, a person may be most impaired when THC is no longer present in the blood. Based upon the above facts, it is difficult to imagine that the Legislature did not intend to include carboxy THC among the substances proscribed by Michigan's per se drug law.

The argument that everything is a compound of another substance is analogous to the defense that a statute is unconstitutionally vague or overbroad. Generally, a criminal defendant may not defend on the basis that the charging statute is unconstitutionally vague or overbroad where the defendant's conduct is fairly within the constitutional scope

of the statute.[26] This is really a principle of standing and except in limited circumstances, usually involving First Amendment Rights, defendants can not challenge a statute on the basis that it may be inappropriately applied to the conduct of others if the defendant's own conduct clearly falls within the meaning of the law. In the present case, even though there are undoubtedly compounds too remotely related in chemical structure to be considered compounds of THC with "similar chemical structure," this is not true in the present case where the substances involved are "mother" and "daughter."

McCoy, again ignoring the language of the statute in favor of attempting to discern the Legislature' intent, also argues that the Legislature could not have intended to proscribe in schedule 1 carboxy THC because it has no pharmacological effect. (Transcript of Evidentiary Hearing, pp 62-63, Appendix, pp 158a-159a). The trial court agreed finding that the Legislature only intended to include substances having a pharmacological effect in schedule 1, or, as the trial judge put it "dogs with teeth." However, the court's logic is belied by the plain language of the statute which includes derivatives and compounds of THC *with similar chemical structure or pharmacological activity, or both.*[27] The use of the disjunctive "or" between the phrases "similar chemical structure" and "pharmacological activity" makes it clear that the Legislature intended to include "dogs without teeth." The phrase "or both" serves to highlight and underscore this point.

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[26] *People v Rogers*, 249 Mich App 77, 95 (2001) (*citing People v Higuera*, 244 Mich App 429, 441-442 (2001)).

[27] MCL 333.7212(1)(d) and MCL 333.7212(1)(e) (the latter of which includes compounds of substances referred to in subdivision (d)).

named substances. Of course, the trial court's reliance on legislative intent at all was neither necessary nor permitted where the plain and ordinary meaning of the language was clear.[28] This Court has repeatedly cautioned against reliance on policy considerations in construing statutes.[29] "The Legislature's intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of "what the Legislature really meant."[30] As this Court stated in *Lansing Mayor v Public Service Comm:*[31] "[R]ather than engaging in legislative mind-reading to discern [legislative intent], we believe that the best measure of the Legislature's intent is simply the words that it has chosen to enact into law."[32]

The decision of the Court of Appeals is notable in that it rejects the arguments of both plaintiff and defense counsel below, the opinion of both expert witnesses, and the trial court's analysis, instead finding that everyone has read the statute wrong in the first place. The Court of Appeals found that the relevant portions of schedule 1 are limited by a rule of grammar[33] to synthetic substances.[34] Plaintiff submits that a fair reading of the statute indicates just the opposite – that the word "derivative" is not qualified by the word "synthetic." Rather, the term "derivative" is just one of a number of substances listed,

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[28] *Watson v. Michigan Bureau of State Lottery*, 224 Mich App 639, 644-645 (1997) (*citing Lorencz v Ford Motor Co*, 439 Mich 370, 376 (1992)).

[29] *People v Schaefer*, 473 Mich 418 (2005).

[30] See *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164 (2004); *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 762 (2002).

[31] 470 Mich 154, 164 (2004)

[32] *Id.* at 164.

[33] The Court did not explain or otherwise describe this rule of grammar.

[34] Appendix, p 263a.

including: (1) "synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis;" (2) "synthetic substances;" (3) "derivatives," and (4) "their isomers."[35] The Court of Appeals erroneously found that the first use of the word "synthetic" in subsection (d) acts to qualify each of the items that follow. If this were true, why would the Legislature include within the same list "synthetic substances" where to do so would be an obvious redundancy? The Court's grammatical analysis rings hollow under any fair analysis of the language of the statute.

What is left of the Court of Appeals' decision is an attempt to discern the Legislative intent in enacting schedule 1, even though the Court has apparently concluded that the statute is clear and unambiguous as written. This Court has repeatedly held that it is the Court's duty to give effect to the intent of the Legislature as expressed in the actual language used in the statute.[36] It is the role of the judiciary to interpret, not write, the law.[37] Judicial construction of statutes is neither necessary nor permitted where the statutory language is clear and unambiguous because it is presumed that the Legislature intended the clear meaning it expressed.[38] Plaintiff submits that the Court of Appeals ignored these principles of statutory construction, as did the trial court, by going outside the language of the statute to ascertain its intent.

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[35] MCL 333.7212(1)(d).

[36] *Halloran v Bhan*, 470 Mich 572, 576 (2004); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402 (2000).

[37] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146 (2002).

[38] *People v Schaefer*, 473 Mich 418 (2005) (*citing Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002); *People v Stone*, 463 Mich 558, 562 (2001)).

B. EVEN IF ONE ENGAGES IN STATUTORY CONSTRUCTION, THE LEGISLATURE INTENDED TO PROSCRIBE DRIVING WITH ANY AMOUNT OF CARBOXY THC IN ONE'S BODY

Although plaintiff has argued above that statutory construction is neither necessary nor permitted in this case where the plain language of the statute is clear, if one were to consider both the Legislature's intent and policy considerations, there are a number of reasons why it is more likely than not that the Legislature intended to include carboxy THC among those substances proscribed by Michigan's per se drug law.[39]

First, requiring proof of actual THC in blood is illogical and would produce absurd and disparate results because only those persons tested within the first few hours of consuming marijuana could be prosecuted for violating MCL 257.625(8), even though it is undisputed that the effects of marijuana may last up to 24 hours. Both experts testified that THC lasts only a short time in the blood before it is absorbed into the body tissue, including brain tissue, where it actually begins to affect behavior. McCoy testified that it is commonly accepted in the scientific community that after two hours, one would expect to see less than 5 ng/ml of THC. (Transcript of Evidentiary Hearing, p 81; Appendix, p 177a). One ng/ml is the cut-off level for detection of THC using GCMS, the testing procedure employed by the Michigan State Crime Laboratory. (Transcript of Evidentiary Hearing, p 82; Appendix, p 178a). Therefore, it can be assumed that the State Crime Laboratory is unable to positively test for THC where the blood specimen is drawn more than two hours after the person has ingested marijuana. As Dr. Glinn states:

> The thing is when you smoke marijuana THC is an active ingredient and rapidly is converted into other metabolites carboxy THC

[39] MCL 257.625(8).

> and others levels of parent drop rapidly within an hour or two it is no longer detectable in the blood, the effects of marijuana last longer than that, and many lab studies confirm this. You can see effects of marijuana up to 24 hours, depending on what tests you use some tests are more sensitive than others. But just because THC is no longer present doesn't mean a person is sober and not experiencing any kind of effects. With that said, we see a wide variability in levels of Carboxy THC. I see levels very very low and witnesses say the person was extremely impaired. The correlation is weak, it is true it is weak at best. On the other hand, if you see a high level of Carboxy THC, and I would consider this to be kind of high it's above average of what we see, I would not jump to the conclusion that the person is not experiencing any effects at all. (Transcript of Evidentiary Hearing, pp 15-16; Appendix, pp 111a-112a).

Considering that in most cases there will be some delay between the consumption of marijuana and getting behind the wheel, additional delay between the start of driving and the event that prompts police suspicion, more delay to procure a search warrant for blood and transportation of the subject to an appropriate hospital or medical facility to obtain a blood specimen, it is unlikely that THC will be detected in most cases even where the driving occurred close in time to the consumption. Accepting defendant's argument as true, the law would only be enforceable where the blood sample is taken within two hours of marijuana use. In other words, a driver's ability to be prosecuted under the new law would have more to do with the timing of the test than with the actual potential for impairment. It is difficult to imagine that this is what the Legislature intended. The potential for disparate treatment of those engaged in similar conduct is manifest.

Second, what is clear from McCoy's testimony are two things: (1) there is currently insufficient scientific study to correlate a specific level of marijuana consumption and its affects upon driving ability; and (2) as summarized in the conclusion to Huestis' article, and accepted as "a good philosophical approach" by McCoy, "any

situation in which both safety for self and others depends on alertness and capability of control of man machine interaction precludes the use of marijuana." (**Cannabis**, Appendix, p 228a).

It is precisely the lack of scientific understanding of the effects specific quantities of marijuana have on driving ability that prompted the Michigan Legislature, as well as ten other state legislatures before Michigan to enact a per se drug law proscribing driving a motor vehicle with any amount of certain controlled substances in one's body.[40] The inability of science to relate a particular level of THC or carboxy THC to a specific level of impairment is precisely the reason why appellate courts around the country have consistently upheld similar statutes against constitutional attack finding that there is a legitimate state interest in proscribing the use of any amount of certain controlled substances, including metabolites.[41]

For example, in *State v Phillips*,[42] the Arizona Court of Appeals addressed the issue whether Arizona's per se drug statute was rationally related to a legitimate state purpose, despite the lack of quantification of drug levels and evidence that there is no useful indicator of impairment from such drugs. The Court rejected defendant's constitutional arguments and held that it was reasonable for the Legislature to determine that there was no level of illicit drug use which could acceptably be combined with driving. The Court states as follows:

> The defendant claims, however, that section 692(A)(3) differs because, unlike alcohol for which there is a fixed level, no quantification is

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[40] See *Williams v Nevada*, 118 Nev 536, 50P3d 1116, 1120 n 15 (2002) (listing other states having similar laws) (Appendix, pp 337a-338a).

[41] *Id.*

[42] 178 Ariz 368, 873 P2d 706 (1994) (Appendix, pp 285a-289a).

> established for unlawful drugs. The expert toxicologist's testimony established that the use of illicit drugs can affect a person's cognitive skills and impair judgment, and that the effects of withdrawal can result in lethargy and mental depression. He also stated that, unlike the blood alcohol concentration test used to measure alcohol impairment, there is no useful indicator or impairment from such drugs because they are fundamentally different from alcohol. Essentially, there can be no meaningful quantification because of the dangers inherent in the drugs themselves and in the lack of potency predictability. The defendant has not presented any evidence to the contrary. We believe that the legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great. The state has a compelling legitimate interest in protecting the public from drivers whose ability may be impaired by the consumption of controlled substances and the legislature reasonably could have concluded that the per se prohibition embodied in section 28-692(A)(3) provided an effective deterrent to such activity. And although section 28-692(A)(1) already makes it unlawful to drive while impaired by illegal drugs, the legislature could have rationally determined that the absence of a reliable indicator of impairment necessitated a flat ban on driving with any proscribed drugs in one's system . . . . The challenged language does not create any type of presumption; it creates a valid prohibition. We find this statute to be a constitutional exercise of the state's police power. We uphold the constitutional validity of section 28-692(A)(3). . . [43]

In *State v Shepler*,[44] the Indiana Court of Appeals held that: "[I]t is not possible to determine the amount of marijuana or cocaine present in a person's body because everyone reacts differently to the ingestion of substances and each person's body processes substances differently."[45] Further, the Court states: "[T]here is no accepted agreement as to the quantity of a controlled substance needed for impairment."[46]

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[43] *Phillips*, *supra* at 873 P2d 708 (Appendix, p 287a).

[44] 758 NE2d 966 (Ind Ct App 2001).

[45] *Id* at 969 (Appendix, p 295a).

[46] *Id* (Appendix, p 295a).

Therefore, the Court concluded, it was reasonable for the legislature to differentiate between alcohol and controlled substances and to prohibit driving with any controlled substance in the body.

Also, in *Bennett v State*,[47] the Indiana Court of Appeals upheld the constitutionality of its per se drug law, noting as follows:

> First, we emphasize the conclusion of this court in *Shepler* and the Arizona Court of Appeals in both *Phillips* and *State v Hammonds,* 192 Ariz. 528, 968 P.2d 601 (1998) [Appendix, p 279a], that a flat ban on driving with any proscribed controlled substance in the body, whether or not capable of causing impairment, is permissible. It is permissible because, unlike alcohol, there is "no acceptable level of drug use that can be quantified so as to distinguish between users who [can] drive unimpaired and those who [are] presumptively impaired.[48]

Consequently, the Court held, "our legislature could have reasonably concluded that no level of schedule I or schedule II controlled substances can be acceptably combined with driving a vehicle."[49] Other states, such as California, go even further prohibiting "drug addicts" from operating motor vehicles, which obviously would include testing for prior use of narcotics without regard to level of impairment. [50]

Next, proscribing carboxy THC, as opposed to just THC, is neither new nor unique. Other states, including Arizona and Indiana, have passed per se drug statutes which themselves specifically proscribe the presence of metabolites of THC.[51]

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[47] 801 NE2d 170 (Ind Ct Apps 2003) (Appendix, pp 313a-321a).

[48] *Id.* at 176 (Appendix, p 319a) (citing *Hammonds*, 968 P.2d at 604) (Appendix, pp 282a).

[49] *Id.* at 176.

[50] See California Vehicle Code § 23152 and *People v Garcia*, 127 Cal Rptr 2d 410 (2004).

[51] See ARS § 28-1381(A)(3) (Appendix, p 290a) and IC9-30-5-1(c) (Appendix, p 299a).

Obviously, this fact cuts both ways: that is, if other states have specifically included the word metabolite in their statute, it seems more likely that the Michigan Legislature, considering these other laws, would have included the word metabolite. However, just because other states have specifically included the word "metabolite" in their per se drug laws it does not follow that Michigan's statute does not include metabolites. Because the Michigan per se drug law refers to schedule 1 for determination of what substances are included, and because the schedule 1 statute includes metabolites because it proscribes "derivatives" and "compounds" of THC, it would have been redundant to include metabolites in § 625(8).

Also, Federal work place safety regulations proscribe persons from using certain controlled substances, and measure for THC use by measuring the amount of metabolites in one's body. (See **Cannabis**, supra at 26; Appendix, p 209a). Dr. McCoy conceded this point and agreed that the level establishing that someone is a user of marijuana under federal guidelines is 20 ng/ml of carboxy THC (in comparison, defendant had a level of 31 ng/ml and 38 ng/ml). Although the federal regulation is intended to protect workers and those whom their jobs affect while per se drug laws are intended to protect the driving public, their goal is the same: safety. It is rational and reasonable to apply similar testing to drivers as with federal regulations on work place safety.

In addition, both experts agree that the presence of carboxy THC means that a person has used marijuana and that the presence of carboxy THC necessarily requires some residual level of THC to be present in the body tissue, although the exact amount is difficult to quantify. (Transcript of Evidentiary Hearing, pp 82-84; Appendix, pp 178a-180a) (See also **Cannabis**, supra at 22; Appendix, p 205a). As indicated earlier, the

testing in this case involved blood, not body tissue (which would be an unusual specimen). The statute proscribes "any amount" of THC "in the body." The trial court found that proof that there is carboxy THC is insufficient to prove that there is THC in the person's body, but left open the possibility that the presence of THC at the time of driving may be proved by evidence of carboxy THC in the blood. However, both experts testified that evidence of carboxy THC is evidence that there is an amount of THC in the body tissue which is incapable of being measured with a reasonable degree of precision. Therefore, although theoretically carboxy THC cannot exist in blood in the absence of THC in body tissue, the court would require the prosecution to go further and to prove actual THC in the body at the time of driving.

For practical reasons, requiring the prosecution to prove the presence of THC places prosecutors in the position of having to present expert testimony, such as the testimony of Dr. Glinn or Dr. McCoy, in every case involving carboxy THC including misdemeanor offenses to explain why proof of carboxy THC leads to the conclusion that THC is also present. In addition, a jury may well be reluctant to convict based evidence that THC is theoretically present, no matter how well accepted the theory, where the actual presence of THC is neither verified nor quantifiable. The Legislature's purpose in enacting the per se drug law was obviously to make prosecution of these crimes easier, not more difficult. Nevertheless the holding of the Court of Appeals will significantly frustrate this purpose.

Finally, Michigan has historically relied upon testing for metabolites in urine, not THC in blood, to determine whether someone is using marijuana. (Transcript of Evidentiary Hearing, p 13-14; Appendix, pp 109a-110a). Glinn testified that the only

way for a person to have carboxy THC in their body is for that person to ingest marijuana. Glinn explained that by its nature, urine will never contain the parent drug THC but only its metabolites. It is still true that violations of bond, probation and parole are based upon tests confirming the presence of metabolites, not THC. It is difficult to conceive that the Legislature, in enacting a statute proscribing driving with "any amount" of marijuana in ones "body," failed to consider the importance that metabolites have historically played in measuring drug consumption.

In summary, the plain language of schedule 1 includes carboxy THC among those substances proscribed because carboxy THC is both a derivative and a compound of THC with a similar chemical structure. The trial court erroneously found that the statute only controls substances with a similar pharmacological effect, which is contrary to the plain language of the statute which includes substances "with similar pharmacological effect, chemical structure, or both."[52] Dr. McCoy's testimony that metabolites are not derivatives because one is produced in vitro and one is not does not consider that metabolites are really a subset of the broader term derivative, nor does it do anything to negate McCoy's own testimony that carboxy THC is a compound of THC with a similar chemical structure. The Court of Appeals erred in finding that derivatives must be synthetic substances, and compounded this error by relying upon an attempt to discern the Legislative intent. Moreover, the Court reaches the wrong conclusion as to the Legislature's intent which was to make prosecution of individuals who use certain controlled substances and choose to drive a motor vehicle simpler. Holding that carboxy

[52] MCL 333.7212(d)

THC is not a schedule 1 controlled substance will significantly frustrate this purpose, and result in absurd and disparate results where successful prosecution will depend more upon the timing of a test than the defendant's amount of marijuana use, or level of impairment.

II. IN PROVING A VIOLATION OF MICHIGAN'S PER SE DRUG LAW CAUSING DEATH OR SERIOUS INJURY, THE PROSECUTION IS NOT REQUIRED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT VOLUNTARILY DECIDED TO DRIVE, KNOWING THAT HE OR SHE HAD CONSUMED AN INTOXICATING AGENT *AND MIGHT BE INTOXICATED*

STANDARD OF REVIEW: Statutory interpretation is a question of law that is reviewed by this Court de novo.[53] Similarly, jury instructions that involve questions of law are also reviewed de novo.[54]

PRESERVATION OF ISSUE: Plaintiff raised this issue in a pre-trial request for jury instructions filed June 9, 2004 which omitted reference to the disputed element. The trial court considered and denied plaintiff's requested jury instructions on other grounds in an order dated 9/27/04. Although the issue was not specifically ruled upon by the trial court or the Court of Appeals, plaintiff raised the issue in a motion to add issue filed with this Court on September 30, 2005. This Court granted plaintiff's motion in an order dated October 19, 2005. In addition, this Court issued its opinion in *People v Schaefer*,

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[53] *People v Moore*, 470 Mich 56, 61 (2004); *People v Babcock*, 469 Mich 247 (2003).

[54] *People v Schaefer*, 473 Mich 418 (2005); *People v Perez*, 469 Mich 415, 418 (2003); *People v Gonzalez*, 468 Mich 636, 641 (2003).

PRESERVATION OF ISSUE: Plaintiff raised this issue in a pre-trial request for jury instructions filed June 9, 2004 which omitted reference to the disputed element. The trial court considered and denied plaintiff's requested jury instructions on other grounds in an order dated September 27, 2004 (Appendix, pp 244a-247a). On July 27, 2005, this Court issued its opinion in *People v Schaefer*, *supra*, on July 27, 2005 while the instant case was still pending before the Court of Appeals on a motion for reconsideration. The *Schaefer* case for the first time set forth the elements of violation of Michigan's per se drug law causing.[55] Although the issue was not specifically addressed by the trial court or the Court of Appeals, plaintiff raised the issue in a motion to add issue filed with this Court on September 30, 2005. The Court granted plaintiff's motion in an order dated October 19, 2005 (Appendix, p 278a). Plaintiff could not have anticipated that this Court would issue an opinion addressing the elements of the new law in the midst of the current appeal.

On August 11, 2005, plaintiff filed an application for leave to appeal with this Court as to the two issues addressed by the Court of Appeals in its opinion dated July 12, 2005. At the same time, plaintiff filed a motion for reconsideration of the proximate cause issue with the Court of Appeals based upon this Court's ruling in *People v Schaefer*, supra. In that case, this Court clarified the elements of operating a motor vehicle while under the influence of liquor causing death,[56] and overruled in part this

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[55] MCL 257.625(8).

[56] MCL 257.625(4)

Court's prior ruling in *People v Lardie.*[57] The Court of Appeals granted plaintiff's motion for reconsideration and issued an order vacating its original opinion. A new opinion was filed on September 6, 2005 granting plaintiff's appeal as to the proximate cause issue. However, the *Schaefer* opinion raised yet another issue as to the proper elements of violation of Michigan's per se drug law causing death. That issue is whether the prosecution is required to prove beyond a reasonable doubt that defendant decided to drive knowing that she had consumed an intoxicating agent *and might be intoxicated.* Plaintiff filed a motion to add this issue to its appeal and this Court granted plaintiff's motion in its order dated October 19, 2005. (Appendix 278a).

In *Schaefer*, supra, this Court set forth the elements of OUIL causing death as follows:

> We hold that the prosecution, in proving OUIL causing death, must establish beyond a reasonable doubt that (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), *or (8)*; (2) the defendant voluntarily decided to drive, *knowing that he or she had consumed an intoxicating agent and might be intoxicated*; and (3) the defendant's operation of the motor vehicle caused the victim's death.[58]

Despite the Court's initial reference to "*OUIL* causing death" in the above quotation, this Court goes on to set forth element one as follows: "defendant was operating his or her motor vehicle in violation of 'MCL 257.625(1), (3), or (8).'" What should be immediately apparent is that OUIL (the acronym most commonly used to denote "operating while under the influence of intoxicating liquor") is proscribed in § 625(1), but not in § 625(3) or § 625(8). Neither of the cases addressed in *Schaefer*

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[57] 452 Mich 231 (1996).

[58] *Schaefer*, *supra* at 433-434 (emphasis added).

involved a violation of § 625(8), or, for that matter, a violation based strictly upon defendant having an unlawful blood alcohol level (UBAL), also proscribed in § 625(1). In so doing, this Court has set forth an additional element for the crime of operating with any amount of a schedule one controlled substance which plaintiff contends was neither contemplated nor desired by the Legislature.[59] Nor was this additional element contemplated by the prosecution in this case in filing its interlocutory application for leave to appeal as the elements of operating with any amount of a schedule 1 controlled substance causing death had not been previously ruled upon by any appellate court prior to *Schaefer*.

Proving that a defendant "[knew] that he or she might be intoxicated" is incongruous with the purpose of § 625(8) which is to impose criminal liability irrespective of whether impairment or intoxication can be proven. The Legislature recognized, as have several other state legislatures, that there is no useful quantification of illicit substances. As noted in *Phillips*, supra:

> . . . unlike the blood alcohol concentration test used to measure alcohol impairment, there is no useful indicator or impairment from such drugs because they are fundamentally different from alcohol. Essentially, there can be no meaningful quantification because of the dangers inherent in the drugs themselves and in the lack of potency predictability.[60]

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[59] This Court noted that although it was overruling its decision in *Lardie*, supra, as it relates to the element of causation, "we do not disturb our other holdings in Lardie, including . . . that the defendant must have 'volunarily' decided to drive 'knowing that he had consumed an intoxicating liquor . . .' *Schaefer*, *supra* at 422 n 4. Because the other elements of OUIL causing death were not at issue in *Schaefer*, it must be assumed that this Court was not intending to re-affirm in any way these other elements.

[60] *Phillips*, *supra* at 709-710 (Appendix, pp 288a-289a).

By proscribing operation of a motor vehicle with "any amount" of marijuana in a person's body, the Legislature surely did not intend for prosecutors to prove beyond a reasonable doubt that the defendant "knew she might be intoxicated." Moreover, there is nothing in the language of the statute that indicates a desire on the part of the Legislature to impose such a requirement. Similarly, the Legislature specifically enacted the UBAL provisions of the drunk driving statute, § 625(1), to eliminate arguments about whether a particular defendant was impaired or intoxicated at the time of driving, it being sufficient to prove that the defendant had an unlawful blood alcohol level.

In addition, the same concerns that Justice Weaver expressed in her concurring opinion in *Lardie*, that the majority opinion in *Lardie* defies "practical workability" because the "change" in operating ability due to intoxication that the prosecution must demonstrate creates a nearly impossible burden of proof, is even more apparent in the case of trying to prove a defendant knew "he or she might be intoxicated." Because the prosecution must prove not only that defendant "voluntarily consumed" a controlled substance, but also that the defendant "knew she might be intoxicated" this two part inquiry must require the People to prove more than simply that defendant ingested the drug; otherwise, the second clause of the sentence would be unnecessary. Hence, some evidence must be produced to prove defendant knew he or she might be intoxicated.

It is necessary to then consider what sorts of evidence are necessary to prove that a particular individual "knew he or she might be intoxicated." One might prove such a fact by an admission of the defendant, such as an acknowledgment that she smokes marijuana in order to achieve a euphoric effect. However, this places the ability to prove or disprove this element uniquely within the defendant's purview. One might also

introduce statements defendant has made in the past to friends or relatives about the effects of marijuana on her psychomotor skills. But in most such cases, this sort of evidence is unlikely to be available. One might introduce evidence that the defendant was involved in a crash prior to the incident resulting in her being detected by law enforcement. This would be evidence that defendant knew she might be impaired. However, such incidents may not exist. More importantly, the necessity of producing this sort of evidence is at odds with the Legislature's purpose to eliminate any requirement that the prosecution prove impairment.

Requiring the prosecution to prove defendant knew she might be impaired by marijuana is incongruous with the language of the statute proscribing the use of "any amount" of a schedule 1 controlled substance. Obviously, the Legislature was not concerned with determining a level of impairment or it would have proscribed "operating while impaired by" marijuana. Since operating while impaired or while intoxicated by marijuana was already proscribed by MCL 257.625(1) and (3) prior to the enactment of Michigan's per se drug law, it is clear the Legislature intended to eliminate any proof of impairment or there would be no reason to enact a new law. By requiring the prosecution to show that a particular defendant knew she might be impaired by her use of marijuana, this Court has, in effect, made impairment an element of the crime.

Moreover, the plain language of the statute nowhere imposes a burden upon the prosecution to prove beyond a reasonable doubt that defendant *knew* she might be intoxicated. In *Schaefer*, supra, this Court states:

> It is ironic that the *Lardie* Court recognized that the Legislature's intent in passing § 625(4) was "to deter the[e] gravely dangerous conduct" of driving while intoxicated, yet interpreted § 625(4) in such a way so as to limit substantially the applicability of § 625(4) beyond that which the Legislature

> envisioned. . . . Unlike the *Lardie* Court, we believe that the best way to "deter this gravely dangerous conduct" is to enforce the statute as written and thereby give the statute the teeth that the Legislature intended. *Schaefer*, *supra* at 434.

It would be ironic if this Court, in *Schaefer*, in attempting to "give the statute the teeth the Legislature intended," and to "enforce the statute as written," unintentionally added yet another hurdle for prosecutors to jump over which the Legislature never envisioned, that is, requiring the prosecution to prove that the defendant knew that he or she might be intoxicated.

In its opinion, the *Schaefer* Court considers the "closely analogous crime of operating a vehicle with a suspended or revoked license and causing death."[61] Requiring the prosecution to prove that a particular defendant "[knew] that he or she might be intoxicated" is analogous to proving that a person with a suspended license knew that he or she might be a danger to other drivers on the road. The Schaefer Court rejected this notion.[62] The Legislature did not, by the plain language of the statute, make such an element of that crime.[63] Justice Weaver pointed out in her concurrence in *Lardie*, that the Lardie majority fundamentally misunderstood the nature of a status crime. *Lardie*, *supra* at 271 n 8. Plaintiff contends that either through oversight, or because this is an issue that was not specifically addressed by the parties in *Schaefer*, *supra*, this Court has perpetuated this fundamental misunderstanding, and the last vestiges of the *Lardie*

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[61] MCL 257.904(4).

[62] *Schaefer*, *supra* at 422 n 4.

[63] See *People v Smith*, No. 229137 (Unpublished decision of the Court of Appeals, dec'd 2/25/03) (upholding the constitutionality of the DWLS causing death statute), and *People v Andrews*, No. 237022 (Unpublished opinion of the Court of Appeals, dec'd 6/17/03) (setting forth the elements of DWLS causing death).

Court's "extra-textual judicial divinations of 'what the Legislature really meant,'"[64] continue to infect this area of the law.

Prior to the decision in *Schaefer*, *supra*, the elements of Michigan's per se drug law causing death had not been addressed by this Court. Because *Schaefer* did not involve a violation of § 625(8) causing death, plaintiff contends that the Court's decision in that case, though referring to violations of section § 625(8), is dicta. It constitutes non-binding obiter dicta because it was simply not necessary to resolve the pertinent issue in *Schaefer*.[65] Plaintiff's application for leave to appeal the Court of Appeals' decision was filed prior to the decision in *Schaefer*, *supra*, and, therefore, did not directly address the issue now presented by the *Schaefer* opinion.

In order to understand the origin of this second element, it is necessary to go back once again to this Courts decision in *Lardie*, supra, in which Justice Riley reasons as follows:

> In eliminating the issue of gross negligence as a question of fact for the jury, the Legislature essentially has presumed that driving while intoxicated is gross negligence as a matter of law. Once the people prove that a defendant was driving while intoxicated, the people need not prove the further point that the defendant's driving was grossly negligent.
>
> In eliminating this requirement, the Legislature likely wished to require proof of a criminal intent for the criminal act of intoxicated driving. The presumption of gross negligence from the act itself is only reasonable if the defendant (1) voluntarily decided to drive and (2) drove knowing that he had consumed an intoxicating liquor or a controlled substance and, therefore, knowing he could be intoxicated.

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[64] *Schaefer*, *supra* at 422 n 4 (*citing Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164 (2004))

[65] See *Dessart v. Burak*, 252 Mich.App 490, 496 (2002) (discussing obiter dicta). Plain statutory language controls over contrary language found in Supreme Court dicta. *Waltz v. Wyse*, 469 Mich. 642 (2004).

> Under common-law involuntary manslaughter, the people must prove three elements in order to establish gross negligence to a jury:
>
> > (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
> >
> > (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
> >
> > (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.
>
> Under the statute at issue, the Legislature's determination that as a matter of law the act of driving while intoxicated is gross negligence would only satisfy this definition if the driver voluntarily chose to drive with the knowledge that he had consumed alcohol.[66]

Justice Riley goes on to state:

> The Legislature may also have had reservations about the ability of the people to prove the third prong of the *Orr* test because a defendant's irresponsible decision to drive while intoxicated is not necessarily "likely to prove disastrous." (Emphasis added.) The Legislature reasonably may have decided that the voluntary act of driving while intoxicated is grossly negligent because it "shows a culpable indifference to the safety of others...."
>
> Moreover, in creating this irrebuttable presumption of gross negligence from the wrongful act, the Legislature intended to deter drunk driving and, therefore, must have intended that the people prove that the driver voluntarily, i.e., "willing[ly]," decided to commit this culpable act. Otherwise, the statute would impose a penalty on a driver who was forced to drive while intoxicated or honestly did not know that he had drunk alcohol before driving. Such a result would not further the Legislature's intent to deter this gravely dangerous conduct because, in those circumstances, the act would not be willingly chosen.[67]

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[66] *Lardie, supra* at 251-252 (citations omitted).

[67] *Lardie, supra* at 252-253.

What is clear from Justice Riley's opinion is that the result is driven by an attempt to discern the Legislative intent in eliminating the gross negligence element of manslaughter from the drunk driving causing death statute. Such attempts to discern Legislative intent as opposed to interpreting the language of a statute as written have since been roundly criticized by this Court.[68] More importantly, while Justice Riley's logic certainly seems apt in an *OUIL* case, it does not hold up in a *UBAL* case where the Legislature's obvious intent was to eliminate altogether any requirement that the prosecution prove impairment – a conviction may be based upon the fact that defendant had an unlawful blood alcohol level alone regardless of whether a defendant was impaired by alcohol. When Justice Riley's logic is applied to a violation of § 625(8), it becomes even more obvious that to apply this added element would defeat the Legislature's intent in enacting a per se drug law.

Finally, Justice Riley concludes that the elements of OUIL Causing death are as follows:

> On the basis of this analysis, the elements of the crime that the people would be required to prove are similar to those for involuntary manslaughter except that the people would not have to prove gross negligence. Hence, the people must prove that (1) the defendant was operating his motor vehicle while he was intoxicated, (2) that he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated, and (3) that the defendant's intoxicated driving was a substantial cause of the victim's death.[69]

It seems possible from the above analysis that the second element is an attempt by the *Lardie* Court to put culpable conduct into the elements of the crime as a surrogate for

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[68] See *Schaefer*, *supra* at 431-432; *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164 (2004); *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 762 (2002).

[69] *Lardie*, *supra* at 259-260.

the Legislature's purposeful omission of such a requirement. Plaintiff does not dispute that *involuntary* intoxication may be a defense to this crime. However, given the extremely limited circumstances in which someone becomes intoxicated without their knowledge (in 12 years as a prosecutor I've never seen it), elevation of what should be an affirmative defense to the level of an element of the crime seems unreasonable, particularly where there is a risk of confusing a jury which might interpret this element to mean that the defendant intended to drink to intoxication. If anything, involuntary intoxication should be an affirmative defense, and should merit an instruction only when pertinent to the particular case. In the present case, there is no evidence to suggest defendant's use of marijuana was involuntary, and an instruction requiring the prosecution to prove beyond a reasonable doubt that defendant voluntarily consumed marijuana is unnecessary and inappropriate if there is any potential to confuse the jury.

In sum, plaintiff submits that in proving operating with any amount of a schedule 1 controlled substance causing death or serious injury, the prosecution must establish beyond a reasonable doubt that (1) the defendant was operating her motor vehicle in violation of MCL 257(8); by operating upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state and while having in her body any amount of a controlled substance listed in schedule 1; and (2) the defendant's operation of the motor vehicle caused the victim's death. Should defendant present some evidence to suggest that her consumption of marijuana was involuntary; the prosecution should be required to prove beyond a reasonable doubt that her consumption of marijuana was voluntary.

CONCLUSION & RELIEF REQUESTED

A fair reading of the language of schedule 1 leads to the conclusion that carboxy THC is among the substances included. The Court of Appeals erred when it found that schedule 1 is limited to synthetic derivatives and compounds of THC. The Court further erred in forsaking the language of the statute and instead attempting to discern the intent of the Legislature by resort to considerations of policy and the Court's own opinion as to what is most rational. This Court should reverse the lower court's holding and find that carboxy THC is a schedule 1 controlled substance because it is both a derivative and a compound of THC with a similar chemical structure.

Second, this Court should find that the prosecution is not required to prove that defendant knew that she "might be intoxicated" by her consumption of marijuana. To hold otherwise would significantly frustrate the Legislature's intent purpose in enacting the law which was to provide penalties for those who use certain controlled substances and choose to operate a vehicle. In addition, this Court should hold that the prosecution is only required to prove that defendant voluntarily consumed marijuana where defendant first presents some evidence that her consumption of the drug was involuntary.

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